BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition of StogMedia	)	Docket No. 17-314
	)	
v.	)	
	)	
Cox Communications Las Vegas, Inc. d/b/a Cox	)	CSR-8947-L
	)	

To: Chief, Media Bureau

OPPOSITION AND MOTION TO DISMISS

COX COMMUNICATIONS LAS VEGAS, INC. d/b/a COX

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December 13, 2017

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SUMMARY

The Bureau should deny and dismiss the StogMedia Petition with prejudice because the plain language of the Commission's rules, policies, and precedents preclude the Petition's unsupported claims. Although the Commission repeatedly and consistently has affirmed cable operators' rights to require reasonable liability insurance for leased access programming, the crux of the Petition is that Cox should be compelled to carry such programming without insurance of any kind. StogMedia significantly raises no relevant issue regarding the reasonableness *per se* of the insurance requirements included in the Leased Access Programming Agreement (the "**Agreement**") StogMedia had agreed to, and the indisputable fact in this case is that had StogMedia simply provided insurance covering the subject leased access programming, Cox would be carrying that programming now. After six months of extraordinary and costly efforts to accommodate StogMedia's mostly incoherent demands, Cox finally declined to proceed further with StogMedia's leased access request only after StogMedia's insurer confirmed its policy provided no coverage for the programming at issue, and StogMedia either was unwilling or unable to provide such insurance. StogMedia's baseless Petition followed.

The Petition raises a number of other unsupported and frivolous claims alleging Cox interfered with the content of leased access programming, prohibited resale of leased access capacity, demanded excessive credit and security, and acted in bad faith. Even a cursory review of the facts and documentation, however, demonstrates that these claims are patently false.

The Petition, moreover, is unsupported by any affidavit or documentation in violation of the Commission's threshold requirements, and references no Commission rule, order, or adjudicatory decision to support the Petition's claims. The Petition consequently fails the "clear and convincing" standard required under the statute and the Commission's rules. In these circumstances, the Commission's rules and precedents preclude assigning any evidentiary weight to StogMedia's Petition.

The Bureau, therefore, should summarily deny and dismiss the Petition.

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OPPOSITION AND MOTION TO DISMISS

Cox Communications Las Vegas, Inc. d/b/a Cox ("**Cox**"), by its attorneys and pursuant to Sections 76.7 and 76.975(e) of the Commission's rules, 47 C.F.R. §§ 76.7 and 76.975(e), hereby submits this Opposition and Motion to Dismiss in connection with the petition for relief (the "**Petition**") StogMedia filed on or about November 14, 2017 in the above-captioned proceeding.[1] Putting aside the Petition's numerous unsupported allegations outlined below, the Petition essentially seeks to compel the carriage of leased access programming that StogMedia neither produces nor controls on Cox's cable television system serving the Las Vegas, Nevada area (the "**System**") without insurance of any kind to protect Cox from liabilities arising from the transmission of such programming on the System.

Nevertheless, in an apparent attempt to obfuscate this fundamental issue, the Petition asserts, but fails to provide any facts, evidence, or authority to support, StogMedia's "beliefs" that:

- Cox is in violation of Section 76.971(e) of the Commission's rules (terms and conditions based on content);
- Cox is in violation of Section 76.971(h) of the Commission's rules (resale of capacity);
- Cox "demanded excessive credit and security requirements";
- Cox "refused and terminated discussion" to provide leased access;

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[1] Cox is filing this Opposition and Motion to Dismiss timely within thirty (30) days after service of the Petition pursuant the Bureau's expressed interpretation of Sections 76.7(b)(2)(ii) and 76.975(e) of the Commission's rules. *See* 47 C.F.R. §§ 76.7(b)(2)(ii), 76.975(e).

- Cox "acted in bad faith . . . while interfering deeply in the content"; and
- Cox is in violation of Section 76.971(d) of the Commission's rules (insurance requirements) "by requiring additional named insured/coverage outside the scope of reasonable [*sic*]."

Cox denies all the allegations in the Petition, which, as demonstrated below, are uniformly false and frivolous. Although Cox's reasonable insistence that StogMedia provide insurance coverage for the programming it requested Cox carry on the System is the primary issue in this case, the reasonableness *vel non* of the terms and conditions of the insurance required under the Leased Access Programming Agreement (the "**Agreement**") StogMedia accepted and signed is not at issue. In fact, had StogMedia simply provided insurance covering the programming it wished Cox to distribute on the System, Cox would be carrying that programming now.

The Bureau should deny and dismiss the Petition with prejudice because StogMedia's request is inconsistent with Section 612 of the Communications Act, 47 U.S.C § 532, (the "**Act**") and the Commission's leased access rules, policies, and precedents (the "**Rules**"), and because acceding to StogMedia's demands would "adversely affect the operation, financial condition, or market development" of the system.[2] The Petition, moreover, fails to comply with the Commission's procedural Rules and fails to satisfy the burden of proof required under the Act and the Rules.[3]

BACKGROUND AND FACTS

StogMedia is a leased access producer well known to cable television operators and the Commission alike. Cox is a multiple system operator that has been offering leased channel capacity for commercial use on its cable television systems throughout the country consistent with Section 612 of the Communications Act, 47 U.S.C. § 532, and the Commission's Rules, 47 C.F.R. §§ 76.701, 76.970, and 76.971, for approximately thirty-three (33) years.

On or about March 13, 2017, StogMedia contacted Cox, provided an incomplete Leased

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[2] *See* 47 U.S.C. § 532(c)(1). The statutory leased access requirements are incorporated in Sections 76.970 through 76.975 of the Commission's rules. 47 C.F.R. §§ 76.970-76.975.

[3] *See* 47 U.S.C. § 532(f); 47 C.F.R. § 76.975(g).

Access Application, and requested a rate card for leased access carriage on the System.[4] Cox provided the rate card as StogMedia requested.[5] Cox also requested that StogMedia provide the additional information specified in Section 76.970(i)(3) of the Rules for *bona fide* leased access information requests.[6] Cox further requested information needed to make an initial determination regarding, *e.g.*, appropriate security deposits, insurance requirements, and technical support that might have been required to carry the leased access programming, which its Leased Access Application was designed to solicit.[7] StogMedia refused to provide any of the information Cox reasonably requested pursuant to the Rules, based on its claims that Cox's requests were attempts to control the content of leased access programming and were in violation of the Rules (or that the Rules were "absurd").[8] Even though StogMedia refused to make a *bona fide* request for information, Cox in good faith nevertheless provided StogMedia with all the

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[4] *See* Exhibit 1, StogMedia correspondence and Leased Access Application dated March 13, 2017. To narrow the issues for the Bureau's consideration, Cox is including only the most relevant correspondence between Cox and StogMedia in the attached Exhibits 1, 2, 3, and 6.

[5] *See* Exhibit 2 (correspondence between Cox and StogMedia regarding leased access application); Cox correspondence dated March 23, 2017.

[6] *Id.*, Cox correspondence dated March 28, 2017. 47 C.F.R. § 76. 970(i)(3) provides that *bona fide* requests for leased access information must include: the desired contract term length; the time slot desired; the anticipated commencement date for carriage; and the nature of the programming. The Bureau's precedents clarify that the rule applies regardless of system size. *See, e.g., Stephen S. Smith v. TCI Cablevision of Texas, Inc.*, 13 FCC Rcd 3121, 3124 at para. 8 (Cab. Serv. Bur. 1998) (applying the rule to then largest cable television operator in the country, and stating that the rule "sets forth in detail four information requirements that a bona fide written leased access request must contain").

[7] *See* Exhibit 2, Cox correspondence dated March 28, 2017. In addition to the specific requirements of Section 76.970(i)(3), the Commission has long held that this information includes, among other things, "the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors." Leased Commercial Access, *Second Report And Order And Second Order On Reconsideration Of The First Report And Order*, 12 FCC Rcd 5267, 5323 at para. 112 (1997); *see also Anthony Giannotti v. Cablevision Systems Corp.*, 11 FCC Rcd 10441 (Cab. Serv. Bur. 1996). The Commission, moreover, typically considers this "nature of the programming" factor in resolving leased access disputes regarding the reasonableness of insurance requirements. *See, e.g., Church of New Bedford v. MediaOne*, 14 FCC Rcd 2863 (Cab. Serv. Bur. 1999) (religious programming); *Campbell v. Time Warner Cable* 13 FCC Rcd 16702 (Cab. Serv. Bur. 1998) (unrehearsed and ad hoc nature of programming). The Bureau has also held that information regarding how the leased access programming will be delivered is relevant to the technical support that may be needed to distribute the programming and the cost of that support. *See StogMedia d/b/a Stog TV v. CableOne, Inc.*, 24 FCC Rcd 2947 (Med. Bur. 2009).

[8] *See* Exhibit 2. *E.g.,* StogMedia correspondence dated March 29, 2017 ("consider the absurdity of the bona fide rule at Section 76.970(i)(3)") ("StogMedia d/b/a Stog TV v. Cable One, Inc. . . . is a sad joke") ("does this not cross the line of Cox trying to impose conditions and/or terms on leased access?" [referring to Cox's request for the "nature of the programming"]).

information specified in Section 76.970(i)(1) of the Rules.[9]

After almost three months of contentious and unnecessary StogMedia posturing and multiple Cox requests, StogMedia had provided only three of the four items required for *bona fide* leased access requests under Section 76.970(i)(3) of the Rules.[10] In the interest of moving the process forward, however, Cox nevertheless began preparing a StogMedia-specific Agreement and again outlined the information necessary for finalizing the Agreement.[11] StogMedia, however, continued to refuse to provide any information regarding "[t]he nature of the programming" it wished Cox to carry on the System as required by Section 76.970(i)(3)(iv) of the Rules, again based on StogMedia's irrational belief that such an inquiry constituted editorial control of leased access programming *per se*.[12] On or about June 5, 2017, StogMedia finally provided information regarding the fourth required item, *i.e.*, the nature of the programming it wished Cox to carry on the System; *viz*:

> It's an 'infomercial' type show entitled "The Heart Attack Grill Diet" which urges viewers to adopt our high fat meat based diet. The infomercial is comprised of testimonials from various people and a few celebrities. It is humorous in nature. There is no violence, profanity, or sexuality. The producer and our local affiliate for the site is Dr. Jon, proprietor, Heart Attack Grill, Freemont Street, Las Vegas.[13]

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[9] *See* Exhibit 2, Cox correspondence dated April 6, 2017; *see also* 47 C.F.R. § 76.970(i)(1). The information Cox provided included the available leased access set-aside capacity in the System, a complete schedule of full-time and part-time leased access rates, a schedule of rates associated with technical and studio costs, and — although StogMedia did not request it and Cox was under no obligation to provide it — a sample leased access contract.

[10] *See* Exhibit 2, Cox message dated June 2, 2017. As of that date, StogMedia refused to provide, among other things: any description of the nature of the programming it proposed to transmit on Cox's cable system; any evidence that StogMedia had obtained the copyrights, permits, licenses, and clearances necessary to publicly perform the programming; any information regarding other channel license or lease agreements to which StogMedia was a party; or any evidence of StogMedia's financial qualifications.

[11] *Id.*

[12] 47 C.F.R. § 76.970(i)(3)(iv). *See* Exhibit 2, StogMedia revised Leased Access Application dated May 19, 2017, response to Exhibit B1 (general description of proposed programming) "***Although this appears close to an attempt to exert some form of editorial control, something forbidden by the law, here's ours***. . . . All **other** programming." (emphasis in original). "Other" obviously is no description of the proposed programming.

[13] *See* Exhibit 2, StogMedia message dated June 5, 2017 (emphasis added). The identity of the programming producer and the relationship between StogMedia and Mr. Basso (a/k/a "Dr. Jon") became an issue for StogMedia's insurance carrier, which declined to cover Mr. Basso's programming under StogMedia's policy because StogMedia had not produced the programming. At various times, StogMedia claimed Mr. Basso was either its agent, its employee, or its affiliate. *See infra* pp.6-7, n.35 and accompanying text.

Cox sent StogMedia a draft proposed Leased Access Programming Agreement the next day.[14]

Over the next three (3) weeks, the parties negotiated several provisions of the proposed Agreement.[15] For example, StogMedia offered to pay quarterly in advance for leased access capacity, and Cox therefore removed the security and bond provisions from its standard Agreement.[16] On Monday, June 26, 2017, StogMedia informed Cox, "[w]e accept your latest agreement with the start date of July 21," but requested additional changes to the carriage schedule among other things.[17] StogMedia also "attached a copy of [its] affiliate authorization informing Cox of Jon Basso as our official affiliate fully authorized to act on our behalf involving Las Vegas programming, including making direct payments."[18]

Cox accepted StogMedia's proposed changes, revised the Agreement accordingly, and provided StogMedia with an Execution Copy of the Agreement within two days.[19] Regarding StogMedia's designation of Jon Basso as its agent, Cox observed, "StogMedia is free to appoint an agent to act on its behalf, of course, but this appointment in no way relieves StogMedia of its obligations under the Agreement, including among other things, its payment obligations."[20] Cox further reminded StogMedia, among other things:

> StogMedia must provide a Certificate of Insurance consistent with the terms and conditions of the Agreement prior to execution (see Section 6). StogMedia may provide such Certificate of Insurance in conjunction with its signed Agreement, but until Cox receives it, Cox will not execute the Agreement and carriage of StogMedia's Programming will not begin.[21]

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[14] *See* Exhibit 2, Cox message dated June 6, 2017. Cox observed that StogMedia had not provided other information required under the proposed Agreement, but, in an effort to move forward in good faith, stated its belief that those items could be addressed directly in the terms and conditions of the Agreement.

[15] *See* Exhibit 3 (correspondence between Cox and StogMedia regarding the Agreement).

[16] *Id.*, Cox correspondence dated June 22, 2017. Therefore, the Petition's allegation that Cox "demanded excessive credit and security requirements," Petition at 1, is demonstrably false and frivolous.

[17] *See* Exhibit 3, StogMedia message dated June 26, 2017.

[18] *Id.* StogMedia later corrected the "Affiliate Affidavit for Dr. Jon," the corrected version of which is attached hereto as Exhibit 4.

[19] *See* Exhibit 3, Cox message dated June 28, 2017.

[20] *Id.*

[21] *Id.*

StogMedia sent Cox a partially executed Agreement along with a purported insurance certificate on June 29, 2017.[22]

The insurance certificate that StogMedia provided unfortunately was facially inconsistent with the Agreement's insurance requirements for several reasons, the most important of which was that StogMedia's insurance did not cover the programming produced by Jon Basso that StogMedia purportedly wished to have Cox distribute on the System.[23] Cox explained the facial deficiencies in the insurance certificate and requested a copy of the relevant insurance policy,[24] which StogMedia eventually provided.[25] After reviewing the policy, Cox explained that StogMedia's insurance, by its terms, failed to cover the programming StogMedia was seeking to have Cox carry.[26]

Over the next eight weeks, Cox suggested several helpful approaches for endorsements or other actions that StogMedia might take to ensure that StogMedia's insurance would cover Mr. Basso's programming.[27] For example, Cox suggested that StogMedia: (i) verify it was producing the programming;[28] (ii) agree to extend his insurance to Mr. Basso as his agent pursuant to Section II.L of the policy;[29] (iii) verify its music rights *etc.* as required under Section IVA.22 of the policy;[30] and (iv) provide a title coverage endorsement under Section IV.A.21 of

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22 *See* Exhibit 3, StogMedia correspondence dated June 29, 2017. The partially executed Agreement and purported insurance certificate are attached hereto as Exhibit 5.

23 *See* Exhibit 6 (correspondence between Cox and StogMedia regarding insurance coverage for programming carried under the Agreement). As the correspondence demonstrates, repeated contradictory statements from StogMedia make ascertaining even the simplest facts extremely difficult. *See, e.g.,* n.35 *infra* (relationship between StogMedia and Mr. Basso); *see also* Exhibit 1 (representing StogMedia as a sole proprietorship) and Petition at 3 (verifying Charles H. Stogner as the "Senior Partner of StogMedia").

24 *See* Exhibit 6, Cox correspondence dated July 3 and July 7, 2017.

25 *Id.,* StogMedia correspondence dated July 7, 2017.

26 *Id.*, Cox correspondence dated July 14.

27 In addition to Cox's multiple written explanations of the insurance issues, Cox verbally explained the issues to Mr. Stogner in an August 9, 2017, telephone conference among him, Cox's Director of Regulatory Affairs, and Cox's Vice President of Regulatory Affairs. Cox agreed during that call to explain again the insurance issues to Mr. Stogner in writing, which it did. *Id.*, Cox correspondence dated August 9, 2017.

28 *See* Exhibit 6, Cox correspondence dated July 26, 2017.

29 *Id.*

30 *Id.*

the policy.[31] Cox also explained repeatedly in the plainest and clearest terms possible what the insurance needed to cover; for example:

> In essence, the insurance must cover Cox for claims and liabilities that arise from the authorized activities and actions taken pursuant to the Agreement. In other words, it must cover Mr. Basso and any programming Mr. Basso or his company produces and provides to Cox to the same extent as the insurance covers programming, if any, that StogMedia produces and provides to Cox.[32]

StogMedia ignored or rejected all of Cox's suggestions.[33] Meanwhile, the actual producer of the programming, Mr. Basso, disavowed any further involvement with StogMedia.[34] StogMedia's insurance carrier also confirmed, "because StogMedia is not producing the commercial / advertisement then there is no coverage afforded under this policy and cannot be added via endorsement."[35] Given (i) the insurer's confirmation that StogMedia's insurance provided no coverage for the Heart Attack Grill programming and (ii) StogMedia's unwillingness or inability to provide any such coverage, Cox declined to counter-sign the Agreement.[36] The Petition followed sixty (60) days' later.

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[31] *Id.*, Cox correspondence dated August 4, 2017

[32] *Id.*, Cox correspondence dated August 25, 2017. As it turned out, StogMedia contemplated neither producing nor providing any programming under the Agreement.

[33] As Cox observed, "You could have accomplished this with an endorsement amending the original policy you presented or with a separate additional insurance policy meeting the requirements of the Agreement, as long as it specifically covered Mr. Basso and his production company for their activities undertaken pursuant to the Agreement. Notwithstanding multiple opportunities to so, and for reasons unknown to Cox, the documentation you have provided for insurance coverage fails to do so." *Id.*

[34] "I intend on having a long term quality relationship with Cox and now understand that I very [sic] made a major mistake in using Charlie Stogner as an agent. I am not contractually bound to him in any way and truly prefer to deal with Cox directly." *See* Exhibit 7 (correspondence between Mr. Basso and Cox) (message dated July 26, 2017) (emphasis added).

[35] *See* Exhibit 6, StogMedia correspondence dated September 14, 2017. StogMedia provided various conflicting assertions regarding its involvement with the production of the programming and its relationship with Mr. Basso. StogMedia variously referred to Mr. Basso as an agent, an affiliate, and a staff member. *See id.,* StogMedia correspondence dated August 9 and August 23. Mr. Basso, in contrast, referred to Mr. Stogner as Mr. Basso's agent. StogMedia's insurance carrier made its own determination and declined to cover Mr. Basso's programming under StogMedia's policy.

[36] *See* Exhibit 6, Cox correspondence dated September 15, 2017.

ARGUMENT

The foregoing demonstrates among other things that the Petition's several unsupported allegations — namely, that Cox "demanded excessive credit and security requirements";[37] "refused and terminated discussion" to provide leased access;[38] and "acted in bad faith . . . while interfering deeply in the content"[39] — are patently false and frivolous. In fact, contrary to these false allegations, Cox made extraordinary and time-consuming efforts to accommodate StogMedia's leased access request, made no credit or security demands, and in no manner interfered or attempted to interfere with the content of any leased access programming (as the correspondence between the parties confirms). The following paragraphs demonstrate that the Petition's primary allegations have no basis in the law or the Rules.

I. THE PLAIN LANGUAGE OF THE COMMISSION'S RULES, POLICIES, AND PRECEDENTS FORECLOSES THE PETITION'S CLAIMS.

The Bureau should deny and dismiss the Petition with prejudice because: (i) nothing in the Act or the Commission's Rules requires Cox to carry leased access programming without insurance covering the programming;[40] (ii) neither Cox's Leased Access Application nor its Leased Access Agreement give Cox any authority over program content; and (iii) nothing in Cox's Leased Access Programming Agreement prohibits the resale of leased access channel capacity so long as the sub-lessee complies with the terms of the Agreement.[41]

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[37] Petition at 1.

[38] *Id.* at 2.

[39] *Id.* at 3.

[40] In fact, requiring carriage of leased access programming without insurance would adversely affect the operation, financial condition, and market development of the cable system contrary to the requirements of Section 612 of the Act because it would expose Cox to substantial liability for carriage of programming over which it has no control. *See* 47 U.S.C. § 532(c)(1) (leased access prices, terms, and conditions must be "at least sufficient to assure that such use will not adversely affect the operations, financial condition, or market development of the cable system").

[41] *See* 47 C.F.R. § 76.971(h).

A. Absent Lessee Provided Insurance Coverage, Cox Has No Obligation To Carry, And StogMedia Has No Right To Demand Carriage Of, Third-Party Leased Access Programming.

Unlike most of the leased access cases involving insurance issues to have come before the Bureau over the years,[42] StogMedia's Petition raises no issue regarding the reasonableness of Cox's insurance requirements. Instead, the crux of the Petition is the novel and absurd claim Cox has violated Section 76.971(d) of the Rules simply by requiring that lessee-provided insurance actually cover the programming carried on the leased access channel.[43] The Petition, of course, provides no citation to any Commission decision or order supporting StogMedia's position, likely because the Commission's precedents belie StogMedia's claim.

For more than twenty-four (24) years, the Commission has recognized and repeatedly affirmed cable television operator rights to require reasonable liability insurance for leased access programming carried on their systems. The Commission in 1993 recognized that insurance may cover the costs and expenses of defending, for example, a prosecution for carriage of an allegedly obscene programming, and stated, "this is a reasonable term or condition relating to the use of leased access channel capacity."[44] In both 1993 and 1996, the Commission further recognized in the context of security deposits, "it would be unfair to require operators to bear the financial risk of carrying leased access programming without the provision of suitable guarantees."[45] In *Anthony Giannotti v. Cablevision Systems Corp.*,[46] the Bureau similarly held that despite the protection cable operators have from certain legal liabilities under Section 638 of the Communications Act,[47] leased access insurance requirements were reasonable given the

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[42] *See, e.g., Church of New Bedford v. MediaOne*, 14 FCC Rcd 2863 (Cab. Serv. Bur. 1999) (religious programming); *Campbell v. Time Warner Cable* 13 FCC Rcd 16702 (Cab. Serv. Bur. 1998) (unrehearsed and ad hoc nature of programming); *Aamen TV v. MediaOne*, 13 FCC Rcd 22244 (1998) (religious programming).

[43] As stated misleadingly in the Petition, "by requiring additional named insured/coverage outside the scope of reasonable [*sic*]." Petition at 1.

[44] Indecent Programming and Other Types of Materials on Cable Access Channels, *First Report and Order*, 8 FCC Rcd 998, 1007 at n.44 (1993).

[45] *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631, 5944-45 at paras. 504-505 (1993); Leased Commercial Access, *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd16333, 16954-55 at para. 52 (1996).

[46] 11 FCC Rcd 10441 (Cab. Serv. Bur. 1996).

[47] 47 U.S.C. § 558.

absence "of any statutory provision that completely protects cable operators from all possible program carriage liability . . . or from the filing of unmeritorious actions against cable operators."[48] Shortly after the Bureau's decision in *Giannotti v. Cablevision*, the full Commission approved its decision "confirm[ing] an operator's right to require reasonable liability insurance coverage for leased access programming[,]" and stated "[s]imilar to the rule for security deposits, insurance requirements may be sufficient to insure adequate coverage."[49] The Commission, however, declined to adopt specific insurance conditions or limits regarding the amount of coverage or type of policy, and instead adopted a standard that "insurance requirements must be reasonable in relation to the objective of the requirement."[50] The Bureau also has specifically considered and rejected contentions that cable operators may not require insurance to protect themselves from potential liability arising from the carriage of leased access programming.[51]

The Petition here raises no issue regarding the reasonableness *per se* of the insurance requirements in the Agreement.[52] Instead, according to the Petition, "by requiring additional named insured/coverage outside the scope of reasonable"[53] [*sic*] Cox is violating Section 76.971(d) of the Rules.[54] Nothing could be further from the truth. The issue in this case is that

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[48] *Giannotti v. Cablevision*, 11 FCC Rcd at 10446, para. 13.

[49] Leased Commercial Access, *Second Report And Order And Second Order On Reconsideration Of The First Report And Order*, 12 FCC Rcd 5267, 5323 at para. 112 (1997).

[50] *Id.*

[51] *John Broyles d/b/a United International Broadcasting Network v. InterMedia*, 16 FCC Rcd 3935 (Cab. Serv. Bur. 2001) (denying injunction to prohibit the interruption of leased access programming absent evidence of required insurance, and rejecting contention that insurance is not required).

[52] Cox's leased access insurance requirements are indisputably reasonable in any event and all other leased access programmers carried on Cox cable systems have accepted them without dispute. Those insurance requirements are set forth in Section 6 of the Agreement (attached hereto as Exhibit 5) and are prototypical of requirements the Commission has approved in numerous other instances since the 1996 *Giannotti v. Cablevision* decision. *I.e.*, $1 million per occurrence errors and omissions coverage for all programming carried on leased access channel capacity. *See, e.g.*, *John P. Ruditis v. Time Warner Cable*, 13 FCC Rcd 13882, 13883-84 (Cab. Serv. Bur. 1998); *Fred Campbell d/b/a AIA TV v. Time Warner Cable*, 13 FCC Rcd 16702 (Cab. Serv. Bur. 1998); *Church of New Bedford v. MediaOne*, 14 FCC Rcd 2863, 2866 (Cab. Serv. Bur 1999). Cox notes that the $1 million insurance requirement approved in *Giannotti* and numerous other Bureau decisions from that period (1996 and later) would be more than $1.5 million in 2017 dollars. *See* https://data.bls.gov/cgi-bin/cpicalc.pl.

[53] Petition at 1.

[54] 47 C.F.R. § 76.971(d). Section 76.971(d) explicitly permits cable operators to "impose reasonable insurance requirements on leased access programmers."

StogMedia refused to provide insurance that would cover any of the programming it was contracting with Cox to carry on the System, which the Rules and precedents referenced above unambiguously permit Cox to require, and which StogMedia's insurance carrier specifically confirmed its insurance did not cover.[55]

Contrary to the Petition's frivolous allegation, moreover, Cox never required "additional named insured/coverage." As the correspondence between the parties demonstrates, Cox sought primarily for StogMedia to provide evidence of insurance covering the Heart Attack Grill programming Mr. Basso would be producing and independently delivering to Cox. Cox repeatedly explained this to Mr. Stogner, but to no avail.[56]

In short, the Commission's Rules and precedents demonstrate that Cox is under no obligation to carry leased access programming absent appropriate liability insurance, which StogMedia refused to provide. Given these circumstances, the Bureau should summarily deny the Petition.

B. Nothing In Cox's Leased Access Application Or Leased Access Agreement Purports To Give Cox Editorial Control Over Leased Access Program Content.

The Bureau should also summarily reject StogMedia's "belief" that "Cox is in violation of Section 76.971(e) where in the beginning Cox made excessive and forceful demands regarding content as if to exercise editorial control."[57] In addition to being a patently false and

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[55] *See* Exhibit 6, StogMedia correspondence dated September 14, 2017 (confirming "there is no coverage afforded under this policy" for the Heart Attack Grill programming).

[56] *See* Exhibit 6, Cox correspondence dated July 26, 2017 at item 1 ("Inasmuch as the Policy purports to cover only programming *produced by* StogMedia, . . . please verify in writing that (i) StogMedia is or will be the *producer* of each episode of the Programming that will transmitted pursuant to the Agreement."). *See also, id.,* Cox correspondence dated August 2, 2017 ("the information StogMedia has provided to date concerning its insurance coverage, including Section II.L.6 and Endorsement 8 of your Axis policy, does not reflect insurance coverage for StogMedia's agents and independent contractors" (*i.e.*, Mr. Basso)); Cox correspondence dated August 4 ("StogMedia's insurance agent, Ms. Kelley, appears to be stating that there is coverage under StogMedia's policy as long as the production . . . is 'community programming for cable television produced by the "Named Insured" during the policy period.' The problem is that it doesn't appear that StogMedia (according to Mr. Basso) actually will be producing the work or that it will be produced 'under StogMedia's direction'."); Cox correspondence dated August 25, 2017 ("In essence, the insurance must cover . . . any programming Mr. Basso or his company produces and provides to Cox to the same extent as the insurance covers programming, if any, that StogMedia produces and provides to Cox").

[57] Petition at 1.

frivolous allegation, StogMedia fails to provide any fact, document, or other evidence to support its irrational "belief," as required by Section 76.6(a) of the Rules. In fact, nothing in the correspondence between the parties, the Leased Access Application, or the Agreement even implies that Cox has or is interested in having any editorial control of any leased access programming in violation of the Rules.[58]

C. The Requirement For A Lessee To Maintain Control Over The Programming and The Leased Access Channel In No Way Prohibits The Resale Of Leased Access Capacity.

The Bureau should reject StogMedia's allegation that "Cox is in violation of Section 76.971(h)" of the Rules because StogMedia misunderstands the meaning of the both the Rule and Section 3 of the Agreement. Moreover, the resale of leased access channel capacity is not an issue here because Mr. Basso was not subleasing channel capacity from StogMedia.

Section 76.971(h) of the Rules provides in pertinent part:

> Cable operators may not prohibit the resale of leased access *capacity* to persons unaffiliated with the operator, but may provide in their leased access contracts that any *sublessees will be subject to the non-price terms and conditions that apply to the initial lessee*[.][59]

Section 3(a) of the Agreement provides in pertinent part:

> LESSEE must remain in *full control over the Programming* and the Channel and may not sublease or delegate *control*, directly or indirectly, in whole or in part, *over the Channel* during the Leased Time to any third party.[60]

The foregoing demonstrates that although the Agreement requires the lessee to maintain control over the programming and the leased channel capacity to ensure that sublessees remain subject to the terms and conditions of the Agreement, it in no way prohibits the resale of leased access channel capacity. Moreover, as the plain language of Section 76.971(h) clarifies, even if

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[58] To the extent the Petition is referring to Cox's request in its Leased Access Application for a description of "the nature of the programming," leased access programmers are specifically required to provide such information under Section 76.971(i)(3) of the Rules and the Commission's precedents, as discussed above. *See supra* nn. 6-7 and accompanying text.

[59] 47 C.F.R. § 76.971(h) (emphasis added).

[60] Agreement, Section 3 (emphasis added). The Agreement is attached hereto as Exhibit 5. Inasmuch no notice to the Lessor regarding any resale of leased access channel capacity is required under the Rules, Section 3 of the Agreement simply implements the requirement under Section 76.971(h) that sublessees remain subject to the Agreement.

Mr. Basso were to be considered a sublessee in this case for the sake of argument, which he obviously is not, the requirement to provide insurance coverage for his programming in accordance with the Agreement would be unaffected (as the plain language of Section 76.971(h) states).[61]

For all the foregoing reasons, the Bureau should affirm the Commission's policies and hold that StogMedia is not entitled to demand carriage without providing insurance covering the programming that may be distributed on the System under the Agreement. The Bureau therefore should deny and dismiss the Petition forthwith.

II. THE PETITION FAILS TO COMPLY WITH THE COMMISSION'S PROCEDURAL RULES AND FAILS TO MEET THE BURDEN OF PROOF REQUIRED UNDER THE STATUTE AND THE RULES.

Apart from the Petition's substantive deficiencies demonstrated above, the Bureau should dismiss, and in any case deny credit to, StogMedia's Petition because it is unsupported by any Declaration, fact, or documentation in violation of the Rules[62] and because it is based on inaccurate assertions and "arguments that the Commission has specifically rejected." The Petition, therefore, is frivolous by definition and the Bureau should summarily dismiss it.[63] In any event, the Petition fails to satisfy the "clear and convincing" evidence standard required under the statute and the Rules,[64] and the Bureau may independently deny it for that reason.

The Rules require that "[f]acts must be supported by relevant documentation or affidavit,"[65] and that each petition or complaint must "state fully and precisely all pertinent facts

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[61] Including "sublessee" in the list of varying descriptions StogMedia has ascribed to Mr. Basso (*see supra* n.35) changes nothing.

[62] *See* 47 C.F.R. § 76.6(a)(3); 47 C.F.R. § 76.6(a)(4) (requiring a full and precise statement of all pertinent facts and considerations); *see also* 47 C.F.R § 1.720(c) ("[f]acts must be supported by relevant documentation"). Cox observes that the eighty-plus page undifferentiated "e-mail string" attached to the Petition, which StogMedia invites the Bureau to review, contains no actual e-mails, and instead is a StogMedia edited creation.

[63] Frivolous pleadings include those "[having] no plausible basis for relief," "based on arguments that have been specifically rejected by the Commission," or "filed for the purpose of delay." *See Commission Taking Tough Measures Against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996); *see also* 47 C.F.R. §§ 1.17, 1.52, 76.6(c) ("It shall be unlawful for any party to file a frivolous pleading with the Commission. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.").

[64] *See* 47 U.S.C. § 532(f); 47 C.F.R. § 76.975(g).

[65] 47 C.F.R. § 76.6(a)(3).

and considerations relied upon to demonstrate the need for the relief requested."[66] StogMedia's Petition includes no Declaration and no relevant facts. Moreover, it provides no supporting documentation other than documentation that StogMedia created and selectively edited itself.[67] The Bureau therefore should dismiss it and in any event cannot afford it any evidentiary weight.

Section 76.975(g) of the Rules also specifically requires that "[t]o be afforded relief, the petition must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970 and 76.971, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available."[68] StogMedia bases its incoherent Petition on nothing more than Mr. Stogner's unsupported and plainly inaccurate characterizations of the facts, Cox's positions, and the Commission's policies; it also fails to reference any Commission Rule, order, or adjudicatory decision to support StogMedia's claims. The Petition therefore fails to satisfy the "clear and convincing" burden of proof required under the Rules.[69] Although one may characterize the "evidence" presented in the Petition in various ways, "clear and convincing" is not one of them given the plain language of the statute and the Commission's unambiguous rules, policies, and precedents. Under these circumstances, the Bureau should summarily dismiss the Petition.

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[66] 47 C.F.R. § 76.6(a)(4)(i).

[67] Cox observes that in these circumstances the Bureau might reasonably expect a supporting Declaration from the actual programmer, in this case, Mr. Basso. The failure of StogMedia to provide a supporting Declaration from Mr. Basso (whether he is characterized as StogMedia's agent, affiliate, staffer, or sublessee) is significant and telling.

[68] 47 C.F.R. § 76.975(g).

[69] The Commission has stated that the "clear and convincing evidence" standard is "heightened" compared to the "preponderance of the evidence standard" which typically is "applicable in most administrative and civil proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard." *American Communications Services, Inc.*, 14 FCC Rcd 21579, 21614-15 at paras. 76-77 (1999).

CONCLUSION

For the foregoing reasons, the Bureau should deny and dismiss the Petition with prejudice.

Respectfully submitted,

COX COMMUNICATIONS LAS VEGAS, INC.
d/b/a/ COX

By: _____
Gary S. Lutzker
Scott S. Patrick

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December 13, 2017

VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, the foregoing Opposition and Motion to Dismiss is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.

_____
Gary S. Lutzker

December 13, 2017

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition of StogMedia.	)	Docket No. 17-314
	)	
v.	)	
	)	
Cox Communications Las Vegas, Inc. d/b/a Cox	)	CSR-8947-L
	)	

To: Chief, Media Bureau

DECLARATION OF DERRICK HANSON

1. My name is Derrick Hanson and I am Director FCC Regulations and Engineering for Cox Communications, Inc., the parent of Cox Communications Las Vegas, Inc. d/b/a Cox (collectively, "**Cox**"), which operates a cable system in the Las Vegas, Nevada metropolitan area. Among other things, I am primarily responsible for all leased access matters at Cox.
2. I have read the foregoing "Opposition and Motion to Dismiss" (the "**Opposition**") and I am familiar with the contents thereof.
3. The facts contained herein and within the foregoing Opposition and Motion to Dismiss are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry. The Opposition is well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.
4. I declare under penalty of perjury that the foregoing is true and correct.

Derrick Hanson
Director FCC Regulation and Engineering
Cox Communications, Inc.
6305-B Peachtree Dunwoody Road
Atlanta, Georgia 30328
Tel: (404) 269-5455

Executed on: December 11, 2017

CERTIFICATE OF SERVICE-

I, Sandra Dallas Jeter, hereby certify that a true and correct copy of the foregoing Opposition and Motion to Dismiss was submitted electronically to the Secretary's Office in Docket No. 17-314, and otherwise sent by first class U.S. mail, postage prepaid, except where hand-delivery is indicated, on this thirteenth day of December 2017 to the following:

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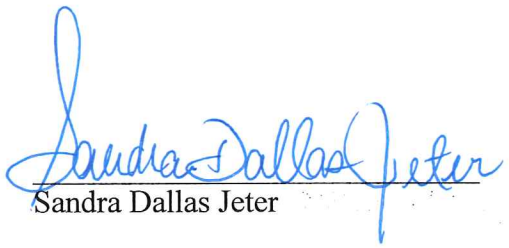

Sandra Dallas Jeter

*By Hand